IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Disciplinary Proceeding Against	)	No. 200,568-3
STEPHEN K. EUGSTER,	)	En Banc
an attorney at law.	)	
_____	)	Filed June 11, 2009

CHAMBERS, J. — Stephen K. Eugster practiced law for 34 years without a history of discipline.[1] Then the Washington State Bar Association (WSBA) charged Eugster with nine counts of attorney misconduct based on Eugster's filing a guardianship petition against his former client without any investigation as to her alleged incompetency and failing to abide by the objectives of the representation. The hearing officer and Disciplinary Board of the Washington State Bar Association (Board) concluded Eugster violated eight current and former Rules of Professional Conduct (RPC). The hearing officer recommended disbarment. A unanimous Board agreed but amended several of the hearing officer's findings of fact.

[1]Eugster was admitted to practice law in Washington in 1970.

Eugster challenges 12 findings of fact. He also argues the Board erred in recommending disbarment because his actions were defensible under former RPC 1.13 (1985) and because the Board ignored mitigating factors that would lessen his sanction. The WSBA argues the court should affirm the findings of fact and conclusions of law and disbar Eugster. We conclude that Eugster's misconduct does not merit disbarment but suspend him for 18 months and impose additional conditions.

FACTS

Due to the way this case has been framed, we find it necessary to discuss the facts in some detail in order to properly resolve the issues presented. Marion Stead hired Eugster in June 2004. When Mrs. Stead contacted Eugster, she was 87 and had recently moved into the Parkview Assisted Living Facility after the death of her husband, John. This was not the first time Eugster worked for the Stead family. In the early 1990s, Eugster represented Mrs. Stead's only child, Roger Samuels,[2] in the dissolution of his marriage. According to the evidence submitted by the WSBA, Mrs. Stead's objective in contacting Eugster in June 2004 was to remove Roger from his position of control over her affairs and to assist her with estate planning.

In 2003, before John's death, the Steads had executed new wills drafted by attorney David Hellenthal. Under the Hellenthal wills, Roger

[2]Roger is Marion Stead's child from her first marriage. To avoid confusion and for the sake of consistency with the findings of fact, we refer to Roger Samuels as Roger.

would inherit the Stead home and his daughter, Emilie, would be the beneficiary of a residual trust. The Hellenthal wills also created a supplemental needs trust for the surviving spouse and named Roger as trustee. As trustee of the supplemental needs trust, Roger had discretion to make or withhold payments so long as it did not disqualify Mrs. Stead from any other assistance. The wills specified the trust was irrevocable and could not, absent a court order, be changed.

In late 2003, dissatisfied with the Hellenthal wills, Mrs. Stead contacted attorney Summer Stahl. Stahl changed the beneficiary of a life insurance policy from Roger back to Mrs. Stead but performed no other services. When Roger discovered that Mrs. Stead had hired Stahl, he became "very upset." Amended Findings of Fact (AFOF) 2.14.1. Roger saw his mother's consultations with Stahl as a betrayal of family trust and questioned her competence. In January 2004, Roger had Dr. Duane Green, a psychologist, examine his mother for testamentary capacity. Dr. Green noted an "'interpersonal issue between Ms. Stead and her son'" and generally observed that she seemed "'"desperate," as she had no access to funds.'" Resp't's Ex. 88, at 17 (quoting Dr. Green). Dr. Green concluded Mrs. Stead was upset over the illness of her husband but had testamentary capacity.

Upon John's death in February 2004, Roger became the personal representative of John's estate and acted as trustee of the supplemental needs trust for the benefit of Mrs. Stead. Roger also assumed control over the

payment of bills because he did not believe his mother was capable of doing so. During this time the relationship between Roger and his mother continued to deteriorate. From the record it appears that Mrs. Stead felt Roger was manipulating her estate and denying her adequate funds so that he could preserve more for himself and his daughter after her death. In particular, Mrs. Stead felt that she had an adequate estate and did not like the idea of being forced to receive Medicaid benefits and not being permitted to have sufficient spending money. Mrs. Stead and her son's relationship became even more strained as Roger continued to refuse her requests for money. Mrs. Stead hoped removing her son from authority over her affairs would help mend their relationship.

In June 2004, Mrs. Stead hired Eugster to "short circuit" Roger's control over her affairs and also to retrieve certain items of personal property from Roger. Eugster had Mrs. Stead revise her estate planning scheme by creating a revocable living trust for her and recommending that she be her own trustee. On June 30, 2004, Eugster wrote to Mrs. Stead saying, "It would be my recommendation that if you like the estate plan which I have drafted for you, that you continue as the trustee of your estate with perhaps help and direction from me." Resp't's Ex. 33. Mrs. Stead was named the trustee with Eugster serving as successor trustee and Roger as secondary successor trustee. To protect Mrs. Stead consistent with the existing testamentary trust and consistent with her desire that Roger not control her

finances, Eugster was given power of attorney both generally and for health care. Eugster contends he reluctantly agreed to so serve as representative and successor trustee after expressing concerns in a letter to Mrs. Stead. Roger served as successor to Eugster in both roles. Eugster testified that installing Roger as second successor trustee enabled Eugster to monitor Roger and prevent him from doing anything untoward against Mrs. Stead's estate without going through Eugster.

In July 2004, Eugster met with Roger to discuss the supplemental needs trust created by John's will. He also consulted with Mrs. Stead's financial planner regarding her suspicion that the supplemental needs trust was overfunded.[3] Eugster made preparations to sell the Stead family home. As to recovering Mrs. Stead's personal property, Eugster located the items she requested but assured her by letter that Roger was keeping them safe. In August, Eugster wrote Mrs. Stead to assure her of Roger's good intentions toward her and recommended Roger resume control over her affairs:

> Roger has been a good and dutiful son to you. I have to be honest about this. You can be proud of Roger. He is not acting to protect himself or to take things from you. He has been acting to ensure that you are taken care of, your bills are paid, your assets are protected, and that you do not have to have unwanted concerns for your welfare as you grow older.

[3]Mrs. Stead's suspicion that the supplemental needs trust was overfunded proved to be true. With the assistance of attorney Andrew Braff, Mrs. Stead was able to recover three assets improperly placed in the trust. There is nothing in the record to suggest that Eugster knew anything about the funding of the trusts.

> Frankly, you should be very proud of Roger.
>
> . . . .
>
> But, I think you should give serious thought to making Roger the successor trustee to your Trust and the person holding your power of attorney.

Resp't's Ex. 52, at 2-3.

In September 2004, Mrs. Stead received another letter from Eugster, suggesting the two of them meet and include Roger. Although Mrs. Stead did not communicate her displeasure to Eugster, it is clear from the record that she was not happy with his response. She responded by seeking the counsel of another attorney, Andrew Braff, who testified that Mrs. Stead wanted to know whether Eugster was representing her or Roger. On September 9, 2004, Braff wrote Eugster notifying him that Braff now represented Mrs. Stead and explicitly revoking Eugster's power of attorney. Eugster responded on September 13, 2004, by letter stating:

> I do not believe that Marion R. Stead is competent. A guardianship should be established for her person and her estate or at least her es[t]ate. Please be advised that I do not recognize that you have been retained to represent her or that the revocation of power of attorney is effective.

Resp't's Ex. 59. Braff then sent a letter dated September 17, 2004, informing Eugster that his "services as Marion Stead's attorney are terminated, and Mrs. Stead wants her files forwarded to this office." Resp't's Ex. 60. In addition, the letter stated "Marion Stead fully expects any and all

communications with you to remain confidential and not to be passed on to Roger Samuels." *Id*. Braff also asked Eugster to advise him of any changes in Marion's competence since the execution of her trust in July where witnesses testified she was of sound mind. Around the same time, Mrs. Stead removed Eugster as successor trustee of her trust and named Stephen Trefts, doing business as Northwest Trustee and Management Services instead.

Eugster states that he believed Mrs. Stead to be a vulnerable senior and that he decided to take action when he learned that Mrs. Stead had hired Trefts. Under the durable general power of attorney prepared by Braff, Northwest Trustee and Management Services was entitled to reimbursement for all costs and expenses and "shall be entitled to receive at least annually, *without court approval*, reasonable compensation for services performed on the principal's behalf." Resp't's Ex. 58, at 4 (emphasis added). On October 8, 2004, Trefts informed Roger that Mrs. Stead had resigned as trustee and had named Trefts as successor. Braff and Trefts also attempted to get Roger, as trustee of John Stead's Testamentary trust, to pay $2,000 per month to them for "one-half of her support."[4] Board Ex. 55. Eugster deemed the requested payment improper under the special needs trust.[5]

[4] Trefts wrote a letter to Roger that stated "At this time, our estimate is that one-half of her support would be approximately $2,000.00 per month. As the trustee of the John Stead Trust, we are asking that you send a check to us on a monthly basis for this amount. We will then use that check, along with her other funds, to pay for her needs." Board Ex. 55.

[5] Eugster contends that in hindsight, his concerns were justified. "After Marion hired Braff and Trefts, her estate was paying thousands of dollars for management fees which where heretofore provided for free by her son, Roger. The carefully crafted estate plan

On September 27, 2004, Eugster petitioned the court to appoint a guardian for Mrs. Stead. Eugster filed the guardianship action pursuant to former RPC 1.13, which provided in part: "(b) When the lawyer reasonably believes that the client cannot adequately act in the client's own interest, a lawyer may seek the appointment of a guardian or take other protective action with respect to a client."[6] Eugster signed his name on the line marked "Petitioner/Attorney" and represented that he was the current attorney for Mrs. Stead. Resp't's Ex. 64, at 6. Roger served as copetitioner at the behest of Eugster, and Roger provided some of the information for the petition. Eugster disclosed to Roger his belief that Mrs. Stead lacked competence. Roger eventually hired an attorney to represent him in the guardianship proceeding.

The petition listed Mrs. Stead's personal and financial information, and characterized Mrs. Stead as unable to manage her person and estate and that she had difficulty monitoring her medications, investments, and expenses. It also described Mrs. Stead as "delusional" because she believed "her son Roger Samuels is somehow out to take advantage of her when this is certainly not the case." *Id*. at 2. In the petition, Roger was nominated to act as Mrs. Stead's guardian. The petition for appointment of a guardian was served on

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she and her husband John established with Hellenthal naming their granddaughter, Emilie, as beneficiary was completely supplanted by a will Marion signed two days before her death naming Roger's ex-wife and an animal shelter as beneficiaries." Opening Br. of Appellant at 30.

[6] Former RPC 1.13 has since been revised into RPC 1.14 (client with diminished capacity) (Sept. 1, 2006).

Mrs. Stead in the common room of Parkview, which humiliated her.

Eugster filed the petition based upon his personal judgment without conducting any formal investigation into Mrs. Stead's medical or psychological state. There is no evidence Eugster consulted Mrs. Stead's healthcare providers or talked with people in the Parkview community. Eugster testified that Mrs. Stead had told him she had seen a doctor in the last six months for a "sanity test" and was aware that she had been examined by Dr. Green before his representation began. Three months before he filed the petition for appointment of a guardian for Mrs. Stead, Eugster had Mrs. Stead sign a new trust, powers of attorney, and a will he had prepared,[7] indicating he had no concerns about her testamentary capacity at that point. The last date that either Eugster or Roger personally talked to Mrs. Stead was on August 3, 2004, nearly two months before filing the petition.

Eugster offered evidence to support his contention that he at all times was motivated to act on behalf of his client's best interest and not to control her trust. According to Eugster, he believed that his client was elderly, vulnerable, and unable to understand her financial affairs, and perhaps being taken advantage of. He tells us he felt an obligation as her attorney to protect her. She was nearly 88 years old when she contacted Eugster. She was confused about her rights under a complex estate plan, and she did not like

[7] The record reflects that Eugster prepared a durable power of attorney for healthcare, a revocable living trust, and a pour-over will that Mrs. Stead signed. However, it is agreed that the distribution of John's estate was still controlled under the plan created by the wills prepared by Hellenthal.

the plan created by Hellenthal. Eugster sought to develop a plan to address her concerns, including determining whether there was a legitimate basis for those concerns. Eugster argues Mrs. Stead's desire to contest her late husband's will, her frequent and repetitive inconsequential communications with Eugster's office, and her continued lack of understanding of how her bills were being paid under the irrevocable special needs trust all support his contention.

Eugster appeared before a judge seeking appointment of a guardian on October 19, 2004. He assured the court he had reviewed the ethical issues involved with him seeking to appoint a guardian. He told the court he believed his actions were ethically viable, and the court asked Eugster to brief the issue. Eugster did not supply a brief but instead, two days later, declined his power of attorney.

By letter dated October 21, 2004, Eugster purported to decline his service as successor trustee over Mrs. Stead's trust and as attorney in fact. Trefts replied, stating Eugster's declination was unnecessary given that Mrs. Stead had terminated Eugster's services and amended the trust to appoint Trefts as successor trustee.

On October 26, 2004, the guardian ad litem (GAL) appointed to evaluate Mrs. Stead concluded she was not suffering from any incapacity and was capable of handling her own affairs.[8] He noted Mrs. Stead's strained

[8] The GAL provided a report from Mrs. Stead's treating physician, Dr. Patrick J. Shannon, MD, which concluded, "I find the patient to be competent to handle her own finances."

relationship and distrust of Roger. The GAL concluded Mrs. Stead did not need a guardian but, if the court did appoint one, the guardian should not be Roger.

On November 17, 2004, Eugster withdrew his signature from the guardianship petition. By stipulation of the parties, the court dismissed the guardianship petition on February 1, 2005. Mrs. Stead paid $13,500 to defend herself in the guardianship action

PROCEDURAL HISTORY

On February 10, 2005, Braff signed a detailed grievance against

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Board Ex. 62. The GAL also interviewed 14 people who had had recent interactions with Mrs. Stead and reported their views on Mrs. Stead's state of mind. Other than Roger and Eugster, all of the individuals interviewed by the GAL reported they believed that Mrs. Stead was competent. For example: Summer Stahl, who met with Mrs. Stead the day of the GAL interview, stated, "there is no incapacity at all." *Id.* at 12. Dennis Sweeney, the builder and designer of the Stead's Colville home who Mrs. Stead had recently contacted to help explain the energy features of the home she was selling said, "without question, that she is able to handle her own affairs." *Id.* at 13-14. Mary Wear, an administrator at the assisted living facility where Mrs. Stead lived, said that she did not believe that Mrs. Stead needed a guardian for personal decisions and had not observed any problems with Mrs. Stead's finances. *Id.* at 14-15. Marilyn Haney, a neighbor who had last seen Mrs. Stead in September, described Mrs. Stead as "'sharp as a tack.'" *Id.* at 15. Lynn McCain, a friend, stated "that once in a great while, she sees confusion in Ms. [Stead]." *Id.* at 16. However, Ms. McCain also told the GAL that Mrs. Stead was "'witty, strong and intelligent'" and that she had never seen Mrs. Stead as anything other than capable. *Id.* Joyce Lingerfelt, a licensed private social worker who had been counseling Mrs. Stead since her husband passed away, said, "'I never thought she needed a guardian.'" *Id.* Ora Mae Sackman, a friend who visited Mrs. Stead at least two times a week, told the GAL that Mrs. Stead had "admitted to her that she need[ed] help with her finances, as her husband [John] had handled the finances prior to his death." *Id.* at 18-19. Ms. Sackman did not believe that Mrs. Stead understood the nature of investing but thought she could pay her own bills, but did not want to. Ms. Sackman said she believed Mrs. Stead made good decisions and that she did not need a guardian.

Eugster. The grievance was also signed, "Approved By" Marion Stead. Clerk's Papers (CP) at 426-28. The WSBA filed a complaint with the Board, under ELC 10.3, charging Eugster with nine counts of misconduct.[9] The WSBA dismissed two counts before the disciplinary hearing. Relevant here, the hearing officer found a clear preponderance of the evidence supported all seven remaining counts.

A. Count one: violation of former RPC 1.2(a)[10]

As to count one, the hearing officer determined Eugster failed to abide by his client's objectives in violation of former RPC 1.2(a) (1985) in two ways. First, Eugster sought to appoint Roger guardian over Mrs. Stead despite the fact she had directed Eugster to remove Roger from control over her affairs. Second, Eugster failed to reclaim property he knew to be in Roger's control that Mrs. Stead requested Eugster recover. The hearing officer determined Eugster's state of mind was knowing and intentional because he knew Mrs. Stead did not want Roger in control of her affairs and Eugster sought personal gain from being in control of her trust. The hearing officer determined Eugster's violation of former RPC 1.2(a) resulted in injury

[9] The WSBA also alleged Eugster violated former RPC 3.4(a) (1985) (count six) and former RPC 3.3(f) (1985) (count seven). These charges were dismissed prior to the hearing.

[10] "A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to sections (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." Former RPC 1.2(a) (2002).

to Mrs. Stead because she lost contact with her son and spent $13,500 to defend against the guardianship. The hearing officer considered whether any aggravating or mitigating factors applied. As for aggravating factors, the hearing officer found Eugster committed multiple offenses, refused to acknowledge the wrongful nature of his conduct, Mrs. Stead was a vulnerable victim, and Eugster had substantial experience in the practice of law and working with elderly clients. The hearing officer found one mitigating factor: no prior disciplinary history.[11] Applying American Bar Association's *Standards for Imposing Lawyer Sanctions* std. 7.1 (1991 Ed. & Supp.1992) (ABA *Standards*), the hearing officer concluded the presumptive sanction for count one was disbarment.

B. Count two: violation of former RPC 1.6(a)[12]

The hearing officer found Eugster violated former RPC 1.6(a) (1990) by "disclosing to Roger and other third parties confidential communications between himself and Ms. Stead, and his impression of her during the representation." CP at 2131. The findings do not state what specific communications Eugster disclosed. Rather, the findings refer to Eugster's assertions in his guardianship petition that Mrs. Stead was "delusional" and

[11] The hearing officer made the same findings regarding mitigating and aggravating factors for all counts.

[12] "A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in sections (b) and (c)." Former RPC 1.6(a) (1990).

"not capable of managing [her affairs]." CP at 2120. The hearing officer determined that Eugster's state of mind was knowing and intentional because he made the disclosures in direct contravention of Mrs. Stead's stated objective to be free of Roger's control. Applying ABA *Standards* std. 4.2, the hearing officer concluded the presumptive sanction for count two was suspension.

C. Count three: violation of former RPC 1.8(b)[13] and 1.9(b)[14]

The hearing officer found Eugster violated former RPC 1.8(b) (2000) and former RPC 1.9(b) (1985) when he sought to appoint Roger as guardian, served Mrs. Stead with guardianship papers in the common room at Parkview, and caused her to spend $13,500 litigating the action. The hearing officer then referred to count two.

D. Count four: violation of former RPC 1.9(a)[15]

The hearing officer found Eugster violated former RPC 1.9(a) (1985)

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[13] A lawyer who is representing a client in a matter

. . . .

(b) Shall not use information relating to representation of a client to the disadvantage of the client unless the client consents in writing after consultation.

Former RPC 1.8(b) (2000).

[14] A lawyer who has formerly represented a client in a matter shall not thereafter:

. . . .

(b) Use confidences or secrets relating to the representation to the disadvantage of the former client, except as rule 1.6 would permit.

Former RPC 1.9(b) (1985).

[15] A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents in writing after consultation and a full disclosure of the material facts.

Former RPC 1.9(a) (1985).

when he "used information gained in the estate planning representation to file a guardianship appointing Roger as guardian." CP at 2132-33. Again, the findings do not tell us what information was used other than referring to the statement in the guardianship petition that the petitioner "'has witnessed Mrs. Stead's lack of ability and capability in managing her affairs.'" Findings of Fact (FOF) 2.32. The hearing officer determined Eugster acted knowingly to the detriment of Mrs. Stead when he filed his petition for guardianship despite arguing she was competent at the time she executed a trust (drafted by Eugster) naming Eugster successor trustee. Applying ABA *Standards* std. 4.32, the hearing officer concluded the presumptive sanction for count four was suspension.

E. Count five: violation of former RPC 1.15(d)[16]

The hearing officer found Eugster violated former RPC 1.15(d) (1985) by not "surrendering papers and property to which the client is entitled, and by refusing to turn over Ms. Stead's client file to Mr. Braff until after the guardianship was dismissed." CP at 2133. The hearing officer determined Eugster acted knowingly because he failed to return Mrs. Stead's file despite several requests. The hearing officer concluded Eugster's violation of former

[16] A lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.
Former RPC 1.15(d) (1985).

RPC 1.15(d) imposed extra cost upon Mrs. Stead for her new attorney to recreate the file and attendant estate planning documents. Applying ABA *Standards* std. 4.12, the hearing officer concluded that the presumptive sanction for count four was suspension.

F. Counts six and seven were dismissed by the WSBA before the hearing.

G. Count eight: violation of former RPC 3.4(c)[17]

The hearing officer found Eugster violated former RPC 3.4(c) (1985) by "filing the petition for guardianship without making a reasonable inquiry about Ms. Stead's mental condition." CP at 2134. The hearing officer determined Eugster acted knowingly. The hearing officer concluded Eugster's manipulation of the judicial system in violation of former RPC 3.4(c) injured Mrs. Stead, the public, and the legal profession. Applying ABA *Standards* std. 6.21, the hearing officer concluded the presumptive sanction for count eight was disbarment.

H. Count nine: violation of former RPC 8.4(d) (2002)[18]

The hearing officer found Eugster violated RPC 8.4(d) by refusing to

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[17] A lawyer shall not:

. . . .

(c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

Former RPC 3.4(c) (1985).

[18] It is professional misconduct for a lawyer to:

. . . .

(d) engage in conduct that is prejudicial to the administration of justice.

Former RPC 8.4(d) (2002).

recognize he had been fired by Mrs. Stead and filing a guardianship petition against his former client. The hearing officer determined Eugster acted knowingly and intentionally when he filed the guardianship petition and knowingly when he involved Roger as copetitioner in the guardianship action against Mrs. Stead's stated objectives as Eugster's client. The hearing officer concluded Eugster's violation of former RPC 8.4(d) cost Mrs.Stead her relationship with Roger, $13,500 to contest the guardianship, and injured the public and legal profession. Applying ABA *Standards* std. 7.1, the hearing officer concluded the presumptive sanction for count eight was disbarment.

By unanimous vote, the Board amended portions of the hearing officer's findings of fact and adopted the recommendation to disbar Eugster. Eugster timely sought review of the Board's order.[19]

ANALYSIS

"This court bears the ultimate responsibility for lawyer discipline in Washington." *In re Disciplinary Proceeding Against Cohen*, 150 Wn.2d 744, 753-54, 82 P.3d 224 (2004) (citing *In re Disciplinary Proceeding Against Anschell,* 141 Wn.2d 593, 607, 9 P.3d 193 (2000)). We give "considerable weight to the hearing officer's findings of fact, especially with regard to the credibility of the witnesses, and we will uphold those findings so

[19] The WSBA alleges several procedural defects relating to Eugster's challenge. However, under RAP 1.2(c) this court may waive or alter the rules of appellate procedure to serve the ends of justice. The WSBA does not allege any injustice would arise from Eugster's noncompliance with the rules of appellate procedure. Considering the severity of the recommended sanction, we believe the ends of justice will be better served by a review on the merits.

long as they are supported by 'substantial evidence.'" *In re Disciplinary Proceeding Against Poole*, 156 Wn.2d 196, 208, 125 P.3d 954 (2006) (citing *In re Disciplinary Proceeding Against Guarnero*, 152 Wn.2d 51, 58, 93 P.3d 166 (2004)). "We give great weight to a hearing officer's determination of an attorney's state of mind because it is a factual finding." *In re Disciplinary Proceeding Against Trejo*, 163 Wn.2d 701, 722, 185 P.3d 1160 (2008) (citing *In re Disciplinary Proceeding Against Longacre*, 155 Wn.2d 723, 744, 122 P.3d 710 (2005)). However, we review a hearing officer's conclusions of law de novo. *Id.* at 717. On mixed questions of law and fact, this court effectively applies a sliding scale of deference. The more the question involves the application of law, the less likely we are to give deference.

CHALLENGES TO FINDINGS

Eugster challenges 12 findings of fact.[20] He generally challenges the original and amended findings of fact as "confusing, incomplete, misleading or erroneous," and as speculative and not supported by substantial evidence. Opening Br. of Appellant, App. A at 43. Most of Eugster's challenges simply add detail to the hearing officer's findings or are based upon his interpretation of the evidence.

Many challenges focus on Eugster's view of Mrs. Stead's objective in retaining him. For example, Eugster argues that it was not contrary to Mrs.

[20] Eugster challenges the following amended findings of fact: 2.13, 2.14, 2.14.1 2.21, 2.24, 2.32, 2.21, 2.22, 2.26, 2.26.1, 2.35. He also challenges one original finding of fact: 2.28.

Stead's objectives to name Roger as her guardian as she had nominated him as such under her previous will. According to Eugster, Mrs. Stead simply wanted to make sure Roger was not taking advantage of her and his actions accomplished her goals. He asserts, "That is what she wanted. Marion wanted Eugster to take over things at least for the time being to ensure her son was not taking advantage of her." *Id.* at 44. One of her goals was to preserve the estate, and it made no sense to pay Eugster to do the daily work when Roger was doing it at no expense to the estate. Eugster testified, "[M]y goal was to really get things in my control so that if Roger was doing something untoward regarding his mother's estate, it wouldn't happen." Verbatim Report of Proceedings at 780. Eugster testified that one of the reasons he was named the successor trustee and Roger was the secondary successor trustee was to ensure Roger "would have to go through [Eugster]." *Id.* Eugster believes he made efforts to bring Roger and his mother closer together and did not destroy their relationship.

Eugster also challenges several findings based upon his view that he was motivated to file the guardianship petition out of his concern about the potential exploitation of a vulnerable adult client. Eugster argues he sought to develop a plan to address these issues, including determining whether there was a legitimate basis for his concerns. However, we note that neither do the findings conclude, nor does the WSBA contend, that Eugster did not subjectively believe that Mrs. Stead was incompetent. They conclude only

that Eugster failed to make a reasonable investigation into Mrs. Stead's competency before filing the guardianship petition and that Eugster acted with knowledge and intent to control the estate. Although the WSBA does not explain why Eugster first recommended that Mrs. Stead act as her own trustee and later Roger act as successor trustee, or why Eugster invited Roger to participate in the guardianship petition if his goal was to control her estate, the record does reflect that Eugster was to serve as successor trustee should Mrs. Stead "resign, become incompetent or die." Resp't's Ex. 36, at 9. Therefore, substantial evidence supports that Eugster would have been trustee had Mrs. Stead been found incompetent.

Additionally, Eugster contends that he did not disclose Mrs. Stead's confidential communications but rather based his statements in the guardianship petition on his general observations—observations he believes should have been obvious to anyone. However, the guardianship petition prepared and signed by Eugster did contain personal information about Mrs. Stead including her address, date of birth, a generalized description of her health and medications, and a list of her assets and the approximate value of those assets. It is unlikely Eugster would have such personal information unless she had provided it to him in connection with his activities as her lawyer.

While the evidence may have well supported Eugster's interpretations, the hearing officer and the Board arrived at different conclusions. Those

conclusions are supported by substantial evidence. We will not overturn findings "based simply on an alternative explanation or version of the facts previously rejected by the hearing officer and Board." *In re Poole*, 156 Wn.2d at 212. We decline to disturb the hearing officer's and Board's finding that the seven counts were proved by a clear preponderance of the evidence.[21]

SANCTIONS

We employ the ABA *Standards* as a basic, but not conclusive, guide to determine the appropriate sanction for attorney misconduct. *In re Disciplinary Proceeding Against Burtch*, 162 Wn.2d 873, 896, 175 P.3d 1070 (2008). The "standards are designed to promote thorough, rational consideration of all factors relevant to imposing a sanction in an individual case." ABA Standards at 1. "'The purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the lawyer to continue in that capacity for the protection of the public, the courts, and the legal profession.'" ABA Standards at 3 (quoting *Ballard v. State Bar of Cal.*, 35 Cal. 3d 274, 291, 673 P.2d 226, 197 Cal. Rptr. 556 (1983)). The ABA has recognized the vast variety of circumstances that might arise in each case of lawyer discipline and created an analytical framework to evaluate misconduct and guidelines for imposing sanctions. *In re Disciplinary Proceeding*

[21] Eugster makes numerous specific arguments challenging the findings of fact. We find none of them to have any merit and that all the findings of the hearing officer are supported by substantial evidence.

Against Stansfield, 164 Wn.2d 108, 122, 187 P.3d 254 (2008). The guidelines were not intended to be rigid but designed to permit "flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct." ABA Standards std. 1.3.

The Board's recommended sanctions receive great deference. "'[W]e should not lightly depart from recommendations shaped by [the Board's] experience and perspective.'" *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 343, 157 P.3d 859 (2007) (alternations in original) (quoting *In re Disciplinary Proceeding Against Noble,* 100 Wn.2d 88, 94, 667 P.2d 608 (1983)). "The Board is 'the only body to hear the full range of disciplinary matters' and has a 'unique experience and perspective in the administration of sanctions.'" *In re Cohen*, 150 Wn.2d at 754 (internal quotation marks omitted) (quoting *In re Anschell*, 141 Wn.2d at 607). However, "we are not bound by the Board's recommendation." *In re Marshall*, 160 Wn.2d at 343. While we will not lightly deviate from the Board's recommendation, if raised, we still must consider two *Noble* factors before imposing sanctions. *In re Disciplinary Proceeding Against Schwimmer*, 153 Wn.2d 752, 764, 108 P.3d 761 (2005) (citing *In re Disciplinary Proceeding Against Kuvara*, 149 Wn.2d 237, 66 P.3d 1057 (2003)). Those two factors are (1) proportionality of the sanction to the misconduct and (2) the extent of the agreement among the members of the disciplinary board. *Id.*

The ABA *Standards* lists four elements or factors the court should examine before imposing sanctions. After a finding of lawyer misconduct, a court should consider the following factors to determine the appropriate sanction: (a) the duty violated, (b) the lawyer's mental state, (c) the potential or actual injury caused by the lawyer's misconduct, and (d) the existence of aggravating or mitigating factors. ABA Standards std 3.0. Analytically, we have described how the court engages in a two-step process utilizing the ABA *Standards*. *In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 195, 117 P.3d 1134 (2005). We first examine the duty violated, the state of mind, and the harm to the victim to arrive at a presumptive sanction. *Id.* Mitigating and aggravating factors are then considered to determine if the presumptive sanction should be modified. *Id.* No one factor is paramount. In determining the appropriate sanction, we examine the lawyer's misconduct as a whole and in context.[22] The court should consider the "appropriate weight of such factors in light of the stated goals of lawyer discipline" and should strive for "consistency in the imposition of disciplinary

[22] The counts must be viewed in context. For example, here the hearing officer found that "Eugster failed to abide by the client's objectives of representation, which were to remove her son Roger from control of her affairs, re-take control of her financial affairs and re-claim property she believed Roger had kept in violation of her wishes. Respondent violated RPC 1.2(a)." AFOF 3.1. The hearing officer and the Board concluded that disbarment was the appropriate sanction, in part, because Eugster wanted to control the estate to earn fees. If Count I described disbarable misconduct when viewed in isolation, then any lawyer who failed to recover personal property, or who in the course of estate planning made recommendations as to who should act in a fiduciary capacity for the client, would do so at risk of disbarment. However, when viewed in the context of this case, the hearing officer's recommendation is not so startling.

sanctions." ABA Standards std. 1.3.

A. *Duty*

The duty or duties violated are important to evaluate the harm of the misconduct. "The extent of the *injury* is defined by the type of duty violated and the extent of actual or potential harm." ABA Standards at 6. "[T]he standards assume that the most important ethical duties are those obligations which a lawyer owes to *clients*." *Id.* at 5. A single act of misconduct may violate more than one ethical duty. The fact that the lawyer's misconduct has violated more than one duty may be relevant to the sanction.

When considering patterns of misconduct and multiple offenses, the ABA *Standards* focuses on the acts of misconduct rather than the number of duties violated because of that misconduct. Where there are multiple counts of misconduct, we focus on the most serious act in evaluating the appropriate sanction because the "'ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations.'" *In re Schwimmer*, 153 Wn.2d at 759 (internal quotation marks omitted) (quoting *In re Disciplinary Proceeding Against Romero,* 152 Wn.2d 124, 135, 94 P.3d 939 (2004)).

In evaluating Eugster's conduct, we are mindful that the WSBA parsed his misconduct into seven counts and that each count violated one or more duties. However, all of the ethical violations arise largely from just two acts of misconduct. By filing what has been determined to be a baseless petition

for the appointment of a guardian for his client, the hearing officer and the Board concluded that Eugster violated the following duties: (1) he failed to abide by his client's objectives in violation of former RPC 1.2(a); (2) he disclosed client confidences in violation of former RPC 1.6(a); (3) he used information relating to the representation of his client to her disadvantage in violation of former RPC 1.8(b) and former RPC 1.9(b); (4) he represented himself, another person with interests materially adverse to his client, in violation of former RPC 1.9(a); and (5) by filing the petition without a reasonable investigation, he violated CR 11 and engaged in conduct that is prejudicial to the administration of justice in violation of former RPC 3.4(c).

In a separate but related act of misconduct of refusing to recognize that Mrs. Stead may not be incompetent, Eugster refused to accept that she had discharged him and retained new counsel. Based on this act the hearing officer and Board concluded he had violated the following additional duties: (6) he failed to surrender Mrs. Stead's files in violation of former RPC 1.15(d); and, (7) by representing to the court that he still represented Mrs. Stead, he engaged in conduct prejudicial to the administration of justice in violation of RPC 8.4(d).

The ABA *Standards* is designed to promote consideration of all factors relevant to imposing the appropriate level of sanction in an individual case. While the number of duties violated from a single act of misconduct may be useful, the ABA *Standards* is not based upon a mechanical tally of the

number of code violations. Again, in arriving at a presumptive sanction, the ABA *Standards* focuses on the acts of misconduct and uses the analytical framework of examining the duty or duties violated, the harm or potential harm to the client, and the lawyer's state of mind.

B. *State of Mind*

To determine whether a lawyer breached an ethical duty "knowingly," we use the "knew or should have known" standard.[23] However, when assessing a lawyer's state of mind for purposes of imposing sanctions, we do not apply the "knew or should have known" standard. *In re Stansfield*, 164 Wn.2d at 127. To do so would eviscerate the negligence standard by forcing us to assume the lawyer should have known the substantial risk of his actions rather than allowing us the flexibility to conclude that he simply failed to heed that substantial risk.[24] *Id.* Instead, when assessing a lawyer's mental state for purposes of imposing sanctions, we look to his state of mind relative to the

[23] For example, a lawyer who gives his bookkeeper a check to be held in trust without instructions on which account it should be deposited cannot argue that he did not know that his bookkeeper would deposit the check into his overdrawn business account; without appropriate supervision, he either knew or should have known that the bookkeeper might deposit the check in the wrong account.

[24] In *Stansfield* we acknowledged that we had approved the application of the "knew or should have known" standard to a lawyer's state of mind regarding consequences (although the example we used applied to the duty violated). *In re Stansfield*, 164 Wn.2d at 123. But we then clarified that the "knew or should have known" standard is not appropriate when analyzing a lawyer's state of mind with regard to the consequences for imposing sanctions. We noted that "if we adopted the WSBA's reasoning, no misconduct would be negligent because rather than failing to heed a substantial risk, we would always assume the lawyer should have known the substantial risk." *Id.* at 127. To apply this standard in analyzing a lawyer's state of mind with respect to the consequences of the act when assessing his mental state for the imposition of sanctions would have the effect of elevating every negligent act to a knowing one.

consequences of his misconduct rather than the duty violated.[25] *See id.* at 123.

A lawyer's mental state toward the consequences of his actions may be either negligent, knowing, or intentional. ABA Standards at 6. The most culpable mental state is intent, defined as "when the lawyer acts with the conscious objective or purpose to accomplish a particular result." *Id.* The next most culpable mental state is knowledge, defined as "when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct but without the conscious objective or purpose to accomplish a particular result." *Id.* When applying the ABA *Standards,* there can be a fine line between intentional and knowing conduct. *In re Stansfield*, 164 Wn.2d at 124. It is often very difficult to distinguish between conscious awareness of the nature or attendant circumstance and conscious objective or purpose to accomplish a particular result. "[I]n cases where we have found an attorney acted with an intentional state of mind, generally the attorney's intent was to benefit herself or himself." *In re Poole*, 156 Wn.2d at 239.

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[25] For example, in *Stansfield* we were confronted with former RPC 1.2(f) (2002), which provided "'[a] lawyer shall not willfully purport to act as a lawyer for any person without the authority of that person.'" *In re Stansfield*, 164 Wn.2d at 119. We can conceive of circumstances in which an employer or insurer requests a lawyer to represent its employee or insured because that person has moved or is travelling and the lawyer is unable to obtain direct authority. If, under such circumstances, the lawyer elects to file a notice of appearance solely to protect the employee or insured from a default until authority can be obtained, we do not believe that the ABA *Standards* demands, that the lawyer be suspended merely because he filed the notice of appearance knowingly. When determining the appropriate sanction, a separate analysis must be done to determine the lawyer's state of mind regarding the consequences of his conduct.

In determining Eugster's state of mind, we reserve the right to determine how much weight to give the hearing officer's findings in arriving at the presumptive sanction. The hearing officer concluded that Eugster's state of mind was intentional with respect to counts 1, 2, and 9. The findings of intent in all three are based upon the same conclusion: that Eugster filed the guardianship action in order to maintain control over Mrs. Stead's trust and the fees it would generate. This conclusion appears to be derived more from the hearing officer's belief that only Eugster would benefit financially if Mrs. Stead were found to be incompetent rather than any finding of credibility regarding Eugster's motives. The hearing officer's findings regarding Count 1 are clear but appear to be somewhat contradictory. For example, if Eugster took control of Mrs. Stead's trust, it supports the hearing officer's conclusion that he did so to control Mrs. Stead's estate for his own gain. But if he failed to take control, then it supported the hearing officer's conclusion that he failed to accomplish Mrs. Stead's objective of removing Roger from control in violation of former RPC 1.2(a). The hearing officer concluded Eugster did both in Count I. The Board inserted an additional finding in an effort to clarify but without much success. AFOF 2.26.1. Neither finding explains why Eugster first recommended that Mrs. Stead act as her own trustee and later recommended to Mrs. Stead, "I think you should give serious thought to making Roger the successor trustee to your Trust and the person holding your power of attorney." Resp't's Ex. 52, at 3. Had Mrs. Stead followed either of

these recommendations, it would have removed or reduced the very control Eugster was found to have sought. Indeed, it was Eugster's act of recommending that Roger, not he, control the trust that led Mrs. Stead to discharge him.

If Eugster did act to control the trust, there is no contention that he failed to perform the work requested, did more work than was necessary, or charged more than he should have.[26] While Mrs. Stead's assets are described as substantial, they were valued at less than $500,000 in the guardianship petition. Finally, while finding that Eugster sought to control Mrs. Stead's estate, the hearing officer also found several times that Eugster substituted his judgment for that of his client. The finding that "Eugster substituted his judgment for hers" is consistent with Eugster's position that he was motivated to do what he subjectively believed to be in the best interest of his client, not that he was motivated to control her assets for his own benefit. Neither the findings nor the WSBA contradicts Eugster's contention that he subjectively believed Mrs. Stead was incompetent to manage her affairs. He is alleged only to have failed to perform an adequate investigation before filing the petition for guardianship. Although we agree that Eugster knew his actions might benefit himself financially, we give greater weight to the hearing officer's finding that Eugster's real failing was in substituting his judgment for that of his client.

[26] Eugster agreed to charge $125 per hour, $25 less than his customary rate.

C. *Harm*

The injury and potential injury to both Mrs. Stead and the integrity of the profession are substantial. Not only did Mrs. Stead expend $13,500 defending the guardianship petition, but she was also confronted with a lawyer whom she believed had completely betrayed her by having her declared incompetent. In addition, it appears that the already tenuous relationship between Mrs. Stead and her son was irreparably damaged as a result of these events. The injury to Mrs. Stead was serious and substantial.

D. *Presumptive Sanction*

To arrive at a presumptive sanction, we must examine Eugster's conduct as a whole and in context and evaluate his misconduct, his state of mind and the harm caused. Having done so, we note Eugster practiced law for 34 years without a disciplinary history, and his misconduct is isolated to a single client and a single legal action lasting over approximately two months, and does not fall within the type of conduct for which disbarment is usually imposed for a first offense. While we are generally reluctant to deviate from the Board's recommendation, after reviewing each of the factors together and in context, we conclude that disbarment is not the appropriate sanction.

However, Eugster's misconduct was serious. Eugster's most serious act of misconduct was to file a petition for the appointment of a guardian alleging that Mrs. Stead was incompetent with virtually no investigation. He acted almost entirely upon his own subjective judgment. As appropriately

described by the hearing officer:

> Ms. Stead wrote in a sworn statement in the guardianship she believed Mr. Eugster was taking the action for his financial gain. Mr. Eugster proffered a finding of fact that he took the actions because he knew best. This lack of understanding of the lawyer client relationship is telling. A lawyer is hired to help people avoid or solve problems, they serve at the pleasure of those who employ them. We are servants, not masters. We can cajole, wheedle, debate, and try to persuade, be we shall not substitute our judgment for the client's.
>
> . . . .
>
> Respondent fails to grasp the most fundamental tenant [sic] of law practice, serve your client, protect their confidences. The damage to the profession here is bad.

CP at 2139-40.

In filing the petition for guardianship, Eugster breached his duty to maintain his client's confidences, used confidences to take action directly contrary to his client's interests, and created a nightmare for his client who had to spend $13,500 defending a petition to declare her incompetent brought by her former lawyer in whom she had placed her trust. However, Eugster's misconduct was the first in a long career. It involved only one client in one legal proceeding and lasted for approximately two months before he took steps to mitigate his actions. Looking at his misconduct in context, the duties breached, his state of mind and the harm or potential harm to his client and the legal profession, we find the appropriate presumptive sanction to be

suspension.

E. *Aggravating and Mitigating Factors*

Once we determine the presumptive sanction, we next consider any aggravating or mitigating factors. *In re Marshall*, 160 Wn.2d at 342. The hearing officer found five aggravating factors: (1) dishonest or selfish motive, (2) multiple offenses, (3) refusal to acknowledge wrongful nature of conduct, (4) vulnerability of victim, and (5) substantial experience in the practice of law. The Board affirmed these aggravating factors. Eugster challenges the application of a "dishonest or selfish motive" as an aggravating factor.[27] Again, the hearing officer based her finding of dishonest or selfish motive upon her conclusion that Eugster had a financial interest in the guardianship petition because he would have gained "control over Ms. Stead's considerable estate" had the guardianship petition succeeded. FOF 3.11. The hearing officer also concluded from Eugster's proposed findings of fact that he "sought to substitute his judgment for his client's." *Id*. The evidence clearly supports a finding that Eugster substituted his judgment for that of his clients. The evidence is more equivocal as to his motive to take control over

[27] In his opening brief, Eugster did not assign error to the hearing officer's application of the aggravating factors. *See* Opening Br. of Appellant at 39-40. In its answer, the WSBA noted what it perceived as a technical flaw in the hearing officer's findings and noted that the aggravating factor of dishonest or selfish motive applied to Eugster. Answering Br. of WSBA at 47 n.19 ("The Hearing Officer repeatedly found that Eugster's misconduct was motivated by financial gain in her analysis of the charges and, therefore, the aggravating factor applies.") Under RAP 10.3(c), the reply brief "should be limited to a response to the issues in the brief to which the reply brief is directed." We consider Eugster's argument timely and permissible given that the WSBA mentioned in its answer that the aggravating factor of dishonest or selfish motive applied to Eugster.

Mrs. Stead's finances. Again, while the hearing officer's finding of dishonest or selfish motive is supported by evidence, we give it less weight in determining the appropriate sanction.

The hearing officer applied only one mitigating factor: no prior disciplinary history. Eugster argues the Board ignored other mitigating factors but does not elucidate which mitigating factors apply in this circumstance. Except for the weight to be given, we accept the hearing officer's and Board's conclusions regarding aggravating and mitigating factors.

PROPORTIONALITY

After we determine the presumptive sanction in light of the relevant aggravating and mitigating factors, we consider whether the sanction is appropriate according to the *Noble* factors, but only if the disciplined attorney raises the issue. *In re Disciplinary Proceeding Against Holcomb*, 162 Wn.2d 563, 592, 173 P.3d 898 (2007). Only one *Noble* factor is relevant here—the proportionality of the sanction to the misconduct. *In re Burtch*, 162 Wn.2d at 900. Eugster asks the court to consider our decisions in *In re Burtch*, *In re Marshall*, *In re Poole*, and *In re Stansfield.* Opening Br. of Appellant at 39-41; Appellant's Statement of Additional Authorities. The WSBA argues these cases are not sufficiently analogous to prove disbarment is not proportionate. Answering Br. of WSBA at 49.

Disbarment is the most severe sanction. We have historically reserved

disbarment for grievous acts of ethical misconduct. Disbarment has generally been applied to four categories of misconduct: (1) the commission of a felony of moral turpitude, *In re Disciplinary Proceeding Against Day*, 162 Wn.2d 527, 173 P.3d 915 (2007) (first degree child molestation); *In re Disciplinary Proceeding Against Stroh*, 97 Wn.2d 289, 644 P.2d 1161 (1982) (tampering with a witness); *In re Disbarment of Barnett*, 35 Wn.2d 191, 211 P.2d 714 (1949) (bartering narcotics);[28] (2) forgery, fraud, giving false testimony and knowing misrepresentations to a tribunal, *In re Burtch*, 162 Wn.2d at 896; *In re Disciplinary Proceeding Against Whitney*, 155 Wn.2d 451, 120 P.3d 550 (2005); *In re Guarnero*, 152 Wn.2d 51; *In re Disciplinary Proceeding Against Whitt*, 149 Wn.2d 707, 72 P.3d 173 (2003); *In re Disciplinary Proceeding Against Miller*, 149 Wn.2d 262, 66 P.3d 1069 (2003);[29] (3) misappropriation of client funds, *In re Schwimmer*, 153 Wn.2d 752; *In re Disciplinary Proceeding Against VanDerbeek*, 153 Wn.2d 64, 101 P.3d 88 (2004);[30] and, (4) extreme lack of diligence, *In re Disciplinary Proceeding*

[28] See also disciplinary actions against: Jeffrey L. Finney (offering a bribe) (May 14, 2008); Jonny Ludington-Green (first degree theft) (Jan. 17, 2007); Joel Santos Manalang (soliciting a bribe) (Aug. 15, 2007); Tyler M. Morris (accepting a bribe) (Apr. 8, 2008), *available at* http://pro.wsba.org/PublicDisciplineSearch.asp (last visited June 5, 2009).
[29] See also disciplinary actions against: Allen C. Hamley (July 9, 2008); Paul Hernandez (May 21, 2008); John P. Mele (May 21, 2008); Mark Todd McCrumb (Feb. 6, 2007); Roger D. Ost, Jr. (Dec. 7, 2007); Dale L. Raugust (July 18, 2007), *available at* http://pro.wsba.org/PublicDisciplineSearch.asp (last visited June 5, 2009).
[30] See also disciplinary actions against: Lynn M. Abreu (Nov. 20, 2007); Robert N. Dompier (May 15, 2008); John B. Jackson III (Apr. 18, 2007); George T. Ryan (Dec. 28, 2007); Tracy M. Shier (Oct. 4, 2007); Darin H. Spang (Aug. 15, 2007); Robert M. Storwick (Dec. 6, 2007); Thomas P. Sughrua (Feb. 20, 2008), *available at* http://pro.wsba.org/PublicDisciplineSearch.asp (last visited June 5, 2009).

Against Anschell, 149 Wn.2d 484, 69 P.3d 844 (2003).[31] It would be unusual, perhaps unprecedented, to disbar a lawyer who does not have a disciplinary history for misconduct involving a single client in a single proceeding for conduct that lasted approximately two months unless it fell within one of these categories. Eugster's misconduct is not among those usually justifying disbarment. There is no contention that Eugster committed a felony involving moral turpitude, or engaged in forgery, fraud, giving false testimony or knowingly making misrepresentations to a tribunal; nor is there any allegation that he misappropriated client funds; nor has Eugster been guilty of extreme lack of diligence. Again, Eugster's misconduct involved a single client and a single legal action involving that client. The misconduct took place over a period of approximately two months after which time he took steps to correct or mitigate his misconduct. His misconduct began in late September 2004 when he refused to release Mrs. Stead's files to new counsel and filed the guardianship petition. By late October, he declined his service as successor trustee over Mrs. Stead's trust and as attorney in fact. On November 17, 2004, he withdrew his name from the guardianship petition. We agree that disbarment is disproportionate.

SUSPENSION

Generally, when we apply the sanction of suspension, we start with a

[31] See also disciplinary actions against: Courtenay D. Babcock (Apr. 7, 2008); Stephen B. Blanchard (July 23, 2008); Mark A. Panitch (Feb. 12, 2007); Michael O. Riley (Jan. 17, 2007); E. Armstrong Williams (Mar. 14, 2007); Gregory S. Zoro (July 9, 2008), *available at* http://pro.wsba.org/PublicDisciplineSearch.asp (last visited June 5, 2009).

minimum of six months. *In re Trejo*, 163 Wn.2d at 722 (quoting *In re Disciplinary Proceeding Against Lopez,* 153 Wn.2d 570, 596 n.11, 106 P.3d 221 (2005) (citing ABA Standards std. 2.3)). However, given the seriousness of Eugster's misconduct, the duties breached, the findings that he acted with knowledge and intent, the seriousness of the injury or potential injury, and four aggravating factors and only one mitigating factor, we conclude a suspension for 18 months is the appropriate sanction. Eugster should also pay restitution to Mrs. Stead's estate in the amount of $13,500.

While not condoning Eugster's actions in any way, we are concerned that this matter might send the wrong message to lawyers who represent the elderly—whether they specialize in elder law or are general practitioners who have represented a family or a client for many years. Issues of a client's competency arise in many forms. However, one scenario which is regrettably not uncommon is for a person of advanced years to fall under the influence of a friend, neighbor, or distant family member. It may come to the attention of a lawyer that an impaired client has fallen under such influence. Often, the friend or distant family member has taken the client to his or her own lawyer who has prepared a new will cutting out other family members and frustrating careful estate planning. Under such circumstances, if the lawyer reasonably believes that her client is suffering diminished capacity and is under undue influence, the lawyer may take protective action under RPC 1.14 without fear of provoking charges of ethical misconduct by the WSBA seeking

disbarment. A lawyer's decision to have her client declared incompetent is a serious act that should be taken only after an appropriate investigation and careful, thoughtful deliberation.

We emphasize that Eugster's actions are distinguishable. First, Eugster failed to make any reasonable inquiry into Mrs. Stead's competency. Second, he knew or had information available to him to suggest Mrs. Stead had a "sanity" or mental status exam and was determined to be competent within six months of filing the guardianship petition. Third, it seems uncontroverted that Eugster believed Mrs. Stead was competent just months before he filed the guardianship petition, when she signed the estate planning documents Eugster prepared for her. Finally, Eugster fails to explain why his epiphany that his client was incompetent seems to have occurred on the very day he discovered that she had retained new counsel and wanted to discharge him. Lawyers who act reasonably under RPC 1.14 are not subject to discipline. Eugster did not.

CONCLUSION

Eugster acted knowingly and with intent with respect to the consequences when he refused to turn over his client's files and important papers as requested and when he filed a guardianship petition to have his client or former client declared incompetent. In so doing he violated seven ethical duties causing actual and potential harm to his client and the profession for which he is suspended from the practice of law for 18 months

and ordered to pay restitution to the estate of Mrs. Stead in the sum of $13,500.

AUTHOR:
Justice Tom Chambers

WE CONCUR:
Justice Susan Owens
Justice Charles W. Johnson
Justice James M. Johnson
Justice Debra L. Stephens